Supreme Court, U.S.
FILED
JUN 7 2002
CLERK

(2)

No. 01-1603

In The

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY
(Sparks, Nevada), et al.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New Mexico

REPLY TO BRIEF IN OPPOSITION

Robert A. Levy
Phyllis B. Levy

1617-D N. Mesa Street
El Paso, Texas 79902
(915) 533-6413

Petitioners pro se

8pg

QUESTION PRESENTED

In a case dismissed because of the running of the statute of limitations, may a State tolling provision which is inapplicable on the given facts nevertheless prevent a litigant from relying upon the federal tolling provision 28 U.S.C. §1367(d), thereby nullifying the federal statute?

TABLE OF CONTENTS

Page

I. The Federal Court Had Original Jurisdiction 1

II. Application of §1367(d) Is Not Limited to Voluntarily Dismissed Claims 2

III. Respondents' Answer to the Question Presented Is Incorrect 3

Conclusion 6

TABLE OF CITATIONS

Cases Cited:

Barbeau v. Hoppenrath, 33 P 3d 675 (N.M.App. 2001) 4

Bajorat v. Columbia-Breckenridge Dev. Corp., 944 F. Supp. 1371, 1383 (N.D.Ill 1996) 2

Statutes Cited:

28 U.S.C. §1367(c) 2

28 U.S.C. §1367(d) 1,2,3,4,5

Other Authority Cited:

Practice Commentary to 28 U.S.C. §1367, by David D. Siegel 2,4

REPLY TO BRIEF IN OPPOSITION

Respondents' Opposition to the Levys' Petition rests on three contentions, none of which is valid:

I. That the U.S. District Court did not have original jurisdiction over *Levy I* and *Levy II* (Opp., pp.3-5);

II. That §1367(d) applies only to claims that were dismissed voluntarily (Opp., p.5); and

III. That §1367(d) is inapplicable because State law provides for a longer tolling period (Opp., pp.6-9) (Respondents' answer to the Question Presented).

I.

THE FEDERAL COURT HAD ORIGINAL JURISDICTION

Levy I is not an issue in this proceeding.[1] As for *Levy II*, not only did the U.S. District Court have original jurisdiction, it had exclusive jurisdiction, for the federal claims were brought under the Federal Tort Claims Act, under which the federal courts have exclusive jurisdiction. When the federal claims were dismissed due to the running of the statute of limitations, the court declined jurisdiction over the remaining non-federal claims. It is just such claims that §1367(d) was enacted to cover, §1367(c)(3). See Practice Commentary, "the 1990 Adoption of 28 USC §1367, Codifying Supplemental

---

[1]Questions relating to *Levy I* and other matters were not addressed by the Memorandum Opinion of the Court of Appeal of New Mexico (App. A at 8a-9a).

Jurisdiction," by David D. Siegel, 28 U.S.C. §1367, p. 829,836-7).

II.

APPLICATION OF §1367(d) IS NOT LIMITED TO VOLUNTARILY DISMISSED CLAIMS

The provision in the statute for claims that are voluntarily dismissed refers to a situation where the federal court declines jurisdiction over one or more claims in the lawsuit but retains jurisdiction of others. In such a situation, to avoid having to prosecute two lawsuits, the plaintiff is given the opportunity to voluntarily dismiss the remaining claims so that the entire lawsuit can be refiled as a single action. §1367(d) provides that, in addition to the claims dismissed by the court, such voluntarily dismissed claims are **also** covered by the tolling provision. See Siegel *(supra),* at 837. Such a situation did not arise in *Levy II* because Judge Hansen dismissed all of the claims, leaving none to be voluntarily dismissed.

Respondents' notion that §1367(d) somehow applies only to the voluntarily dismissed claims amounts to a complete misreading of the intent of the statute and is totally unsupported by authority. These Respondents appear to be the only parties to have ever even urged such an argument. See for example *Bajorat v. Columbia-Breckenridge Dev. Corp.,* 944 F. Supp. 1371, 1383 (N.D.Ill 1996), holding as a matter of course that claims dismissed by the court are covered by §1367(d).

III.

RESPONDENTS' ANSWER TO THE QUESTION PRESENTED IS INCORRECT

The last antecedent rule, the plain meaning test, and the weight of authority, all support Petitioners' interpretation of the duration clause in §1367(d). Respondents' construction is supported by nothing other than bare assertion. Not even their cited cases support their contention.

Respondents cannot evade the significance of the last antecedent rule by glossing over it, since it provides an unequivocal answer to the basic question, namely, what is the significance of the duration clause, "unless state law provides for a longer tolling period"? Does it mean, as Respondents contend, that the statute itself is inapplicable when state law provides for a longer tolling period, or does it mean only, as Petitioners contend, that the tolling period is longer if state law so provides, thereby giving the litigant at least 30 days to refile? The last antecedent rule answers the question unequivocally in favor of Petitioners' contention.

The plain meaning of 1367(d) is that a litigant has at least 30 days to refile after his case is dismissed. Such construction is consistent with the dicta quoted in the cases cited by Respondents.[2]

As for authority, see Siegel, at 836, "Subdivision (d) answers this dilemma by assuring that the claim shall have at least a 30-day period for state action after it is dismissed by the federal court" (Emphasis added).

---

[2]The cases themselves are irrelevant to the issues herein.

Respondents assert that Congress has "reasonably deferred to the statute that is more beneficial to the dismissed party." However, if said statute is inapplicable to the dismissed party, it is hardly more beneficial.[3]

Application of standard rules of statutory construction and the weight of authority reach a different result as to the "plain meaning", namely that the statute is intended to give the dismissed party at least 30 days to refile, regardless of the state provision. After that, the state statute can be invoked, but for the first 30 days, the federal statute protects the dismissed party from the "fine print" of the state statute, which takes away with one hand what it gives with the other.

Moreover, Respondents' construction does in fact give States control of the federal law, as explained in the Petition, with examples from Georgia and California (Pet. 7-8) which Respondents ignored in their Opposition, and in this case, where the State of New Mexico made a new interpretation of its tolling statute in *Barbeau v. Hoppenrath*, 33 P 3d 675 (N.M.App. 2001) (Pet., App. A, 6a), based on which the Court of Appeals affirmed the dismissal of Petitioners' Complaint. Their contention implies that Congress intended to allow the states to nullify §1367(d) whenever they want to. No authority exists that would support such an absurd construction. Paraphrasing the Calendar Notice of the Court of Appeals (Pet.,fnt. 3, p.7), if Respondents wished to make such an argument, they should have directed the Court to some authority in support. They did not and could not.

---

[3]Respondents' analogy to the jurisdictional threshold for diversity cases is also misplaced (Opp. p.8); Congress has not "deferred to state law"; it has merely deferred small cases to state courts.

CONCLUSION

The issues are joined. Petitioners and Respondents have given opposing answers to the Question Presented. Petitioners believe that the construction of an important federal statute must be resolved by this Court. Only then will litigants know where they stand when they invoke the provisions of the supplemental jurisdiction statute, since the lower court decisions in this case are unpublished and have no precedential value.

Petitioners respectfully request that their Petition for Writ of Certiorari in this matter be granted, so that these important issues may be given a definitive resolution.

Respectfully submitted,

Robert A. Levy
Phyllis B. Levy
1617-D North Mesa Street
El Paso, TX 79902-3576
(915) 533-6413

Petitioners pro se